United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

75-1061 B P/S

In The

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 75-1061

APPEAL

from the

UNITED STATES DISTRICT COURT

for the

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,

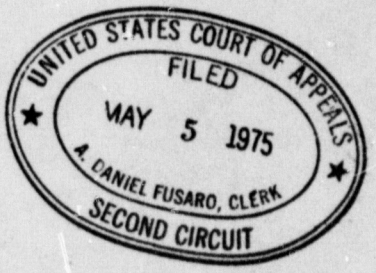
-APPELLEE,

vs.

LEON EUGENE MCCLOUD,

DEFENDANT-APPELLANT

APPELLANT'S BRIEF AND APPENDIX



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Appellant

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DEFENDANT-APPELLANT'S BRIEF

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III. STATEMENT OF THE CASE.

A. HISTORY OF THE DISTRICT COURT PROCEEDINGS.

The defendant-appellant Leon McCloud was indicted on December 6, 1973 and charged with two counts of bank robbery, in violation of 18 U.S.C. §§2113(a) and (b). The principal evidence against McCloud was approximately fourteen thousand dollars in cash and a pistol, found in the basement of McCloud's apartment building, and the identification of him as the robber made by the bank manager following a line-up conducted on the night of the robbery. Prior to trial, McCloud filed separate motions to suppress the money and pistol as evidence against him and to suppress the line-up identification and any subsequent in-court identifications [Appendix, Exhibits 8 and 9, p. A-44, A-47]. An evidentiary hearing was held in connection with the motions on March 18-19, 1974. The motions were denied by the district court, Blumenfeld, J., in a written opinion [App., Ex. 5, p. A-7] filed on September 19, 1974.

On December 11, 1974, McCloud was found guilty of

two counts of bank robbery after a two-day jury trial. On February 3, 1975, McCloud was sentenced to five years imprisonment on each count, to run concurrently, with execution suspended, and probation for five years.

Notice of appeal was filed on February 13, 1975.

B. STATEMENT OF THE FACTS.

1. Evidence Presented At The Evidentiary Hearing Held In Connection With McCloud's Motions To Suppress (March 18-9, 1974).

On November 28, 1973, at approximately 3:00 p.m., a lone individual robbed the State Dime Savings Bank in Enfield, Connecticut [Transcript of Hearing (Record on Appeal, volumes I and II), p. 5]. Several hours later, four FBI agents and one Enfield police officer, pursuing their "best lead," arrived at McCloud's apartment at 11 Winter Street, Hartford, to inquire as to McCloud's possible knowledge of the robbery [T., p. 31, 14, 32, 15]. After initial converstaion with McCloud's common-law wife, Eva Edwards, the agents spoke with McCloud concerning

his whereabouts during the time in question and his possible knowledge of the crime [T., p. 15].

After approximately fifteen minutes of conversation, agent Santacroce asked McCloud to accompany the agents to headquarters "to clear up whether or not he was involved in this situation [T., p. 18]." While all the witnesses at the hearing agreed that such a request was made, the testimony differed as to the nature of Santacroce's request and McCloud's response.

Santacroce testified that he asked McCloud to go to the police station "to possibly appear in a line-up [T., p. 18]," and that McCloud, after an initial period of silence, stated he would be glad to go [Id.] Agent Millen, who was also present at McCloud's apartment, gave a similar account of the conversation [T., p. 44]. The agents also testified that they had no warrant for McCloud's arrest [T., p. 14] or detention for line-up purposes [T., p. 21] and that McCloud was not informed of any of his constitutional rights at the apartment [T., p. 16].

McCloud testified that Santacroce did not mention a line-up when he asked McCLoud to come to headquarters, but rather had indicated that McCloud might be able to assist in the continuing investigation of the robbery [T., p. 59]. Furthermore, McCloud testified that initially he had declined to accompany the agents, informing them that he "was tired ... and would come down the next day" by himself [Id.] Only when the agents, insisted, in a tone that sounded like a command to McCloud [T., p. 60], did he agree to go to headquarters; as McCloud stated under cross-examination, he agreed to accompany the agents because "there was a police officer asking me to do something, and plus the fact that there was about six to seven officers there and I was fear -- you know, was scared of them beating me or something like that [T., p. 63]." McCloud also testified he had never been interrogated by police officers before [T., p. 103].

Eva Edwards, McCloud's common-law wife, corroborated McCloud's testimony, testifying that in response to Santacroce's request "to go down to headquarters to clear up a few matters ... to get the situation cleared up tonight," McCloud had stated, "No, wait until tomorrow

[T., p. 79]." Only after the agents persisted did McCloud agree to go [Id.]

Daisy Jones, McCloud's next-door neighbor, also confirmed McCloud's version of the conversation [T., p. 95].

After accompanying the agents to Hartford police headquarters, McCloud was placed in a small interrogation room, was for the first time informed he was a suspect, and was interrogated by the investigating agents [T., p. 21]. After approximately one hour of interrogation, Millen asked McCloud to participate in a line-up and presented him with a line-up consent form [T., pps. 38-9; App., Ex.2, p. A-4]. Among other things, the form stated, "You are required to participate in the line-up ... [T., p. 62]."

This form was initially put into use in 1968, prior to Davis v. Mississippi, 394 U.S. 721 (1969), and incorrectly advised McCloud that he was required to participate in the line-up. [See District Court Ruling at A-19; pps. 15-6, infra.]

After reading the form, McCloud executed the written consent to appear in the line-up [T., p. 38-9]. After receiving the written consent, the agents for the first time attempted to arrange a line-up [T., p. 39].

At the line-up, conducted that evening on the third floor of the police station, McCloud was viewed by Ernest Woolette and Mildred Root, employees of the bank [T., p. 10]. Woolette made a positive identification of McCloud as the robber, while Mrs. Root was only able to eliminate the other participants in the line-up as possible suspects and indicate that McCloud resembled the robber [T., p. 10]. Woolette had previously told the agents that the robber did not have a moustache; at the line-up, McCloud had a moustache [T., p. 29].

Subsequent to the line-up, McCloud was returned to the interrogation room and informed that he was under arrest for the bank robbery [T., p. 113], although no warrant had as yet been secured [T., pps. 118-9]. McCloud was asked, at this time, to consent to a search of his premises, which he did, in writing, executing a standard

consent to search form specifying his permission to search his automobile and the first floor of his apartment at 11 Winter Street [T., p. 114; App., Ex. 3, p. A-5]. After consultation with her husband, Eva Edwards also executed a similar form consenting to a search of the first floor of the apartment [T., p. 127; App. Ex. 4, p. A-6]. McCloud and his wife intended to limit the search to the first floor area at 11 Winter Street [T., pps. 163-4]. The agents understood the consents to be limited to the first floor area at 11 Winter Street [T., pps. 127, 129-30, 139, 150, 155]. Both McCloud and his wife were informed by the agents (and by the forms) of their right to refuse to permit a search in the absence of a search warrant [T., p. 128, 121]. No other advice as to constitutional rights was ever given to Eva Edwards [T., p. 23]; McCloud was also informed earlier of his Miranda rights [T., p. 109].

While her husband was being interrogated, Eva Edwards was also interrogated by Santacroce concerning her possible involvement in the robbery [T., p. 24].

Even after Ms. Edwards indicated her unwillingness to submit to such interrogation, the agents persisted [T., p. 168]. Although Ms. Edwards was, in fact, a suspect in the case [T., p. 24], no Miranda warnings were ever given to her [T., p. 23].

After receiving the consents to search, three agents and Ms. Edwards went, in separate cars, to 11 Winter Street, where agents Brandon and Millen, under Santacroce's supervision, searched the first floor of the apartment [T., pps. 138-9]. During this search, Brandon observed a door leading off the living room and determined from Ms. Edwards that the door led to a basement area used by McCloud and her [T., p. 139]. Santacroce testified that at this point he requested permission from Ms. Edwards to search the basement [T., p. 140], such permission being necessary to extend the original limits on the search [T., p. 155]. Ms. Edwards testified that Santacroce neither requested nor received her permission to search the basement [T., p. 163].

No evidence was found on the first floor of the apartment. In the basement, the agents found approximately fourteen thousand dollars in cash and a pistol. In

McCloud's automobile, the agents found numerous .380 shells.

2. Evidence Presented At Trial (December 10-11, 1974).[1]

At trial, twelve witnesses testified concerning the robbery of the State Dime Savings Bank, Enfield, Connecticut on November 28, 1973.

Three bank employees testified concerning the identity of the bank robber, and the statement of a fourth employee was received by stipulation. Ernest Woolette, bank manager, testified as to the fact of the robbery. Woolette positively identified McCloud as the bank robber and testified he had previously identified McCloud at a line-up held on the night of the robbery. Woolette admitted that the robber's face was mostly concealed from view by dark sunglasses and a hat covering the robber's face;

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1. Since the evidence relating to the issues raised in this appeal is wholly contained in the transcript of the evidentiary hearing, the appellant has not submitted, nor ordered, a transcript of the actual trial proceedings herein. This summary of the trial evidence is presented to acquaint the Court with the facts of the case and thus place in context the significance of the contested evidence. The appellant does not anticipate an argument from the Government of harmless error.

Woolette was thus only able to see clearly the area of the robber's face from the nose down. On the day of the robbery, Woolette told police the robber did not have a moustache; McCloud had a moustache when he was picked out of the line-up by Woolette.

Maureen Pell, a teller at the bank on the day of the robbery, was unable to identify McCloud as the bank robbery.

Maureen Griffin, a bank teller, made a positive in-court identification of McCloud as the robber, but admitted she had not seen the robber since the time of the robbery, over a year before, and had told police the robber had a goatee. At the time of the in-court identification, McCloud was seated at the defense table and was the only black man in the courtroom.

The statement of Mildred Root, head teller on the day of the robbery, was admitted into evidence and indicated that Root had viewed the same line-up as Woolette and could not positively identify McCloud as the robber, although McCloud did resemble the robber.

Three FBI agents testified concerning their investigation on the day of the robbery, their encounter with McCloud at his apartment, and their subsequent discovery of the bank money and pistol in the basement of McCloud's apartment building and of several shells in McCloud's automobile. The agents also testified as to conflicting statements given by McCloud as to his presence in Enfield on the day of the robbery. The agents also testified that on the day of the robbery McCloud had a moustache and no goatee.

The testimony of several witnesses established that someone using McCloud's name had rented a brown Hertz automobile on the day of the robbery, that that automobile had been seen in the area of the bank prior to the robbery, that the bank robber had been seen leaving the bank in a similar brown car, that someone using McCloud's name had returned the automobile to Hertz at 6:00 p.m. that evening, and that a Hertz receipt was found on McCloud in a search incident to his arrest at the police station. Testimony also revealed that approximately fourteen thousand dollars was missing from the bank.

IV. ARGUMENT: MCCLOUD WAS IMPROPERLY COMPELLED TO PARTICIPATE IN THE LINE-UP CONDUCTED ON NOVEMBER 28, 1973 AT THE HARTFORD POLICE STATION, AND IDENTIFICATION TESTIMONY WAS THEREFORE ERRONEOUSLY ADMITTED AT TRIAL.

The first issue raised in this appeal is whether Woolette's identification testimony was improperly admitted into evidence at trial because McCloud was unconstitutionally compelled to participate in the line-up that formed the basis for such testimony. Specifically, this Court must decide whether McCloud was improperly induced to agree to the line-up by a consent form that incorrectly advised him he was required to participate in the line-up.

On the night of November 28, 1973, McCloud accompanied several FBI agents to the Hartford police station. After undergoing questioning for over an hour, McCloud was presented with a line-up consent form (entitled "Your Rights at a Lineup") and was asked by FBI agent Millen if he would consent to appear in a line-up. The third sentence of the form stated:

> You are required to participate in the line-up but you are entitled to have an attorney of your own choosing present. [Emphasis added.]

After reading this statement, McCloud executed the form, thereby agreeing to participate in the line-up.

It is clear, and the district court so held [App., Ex. 5 at A-19], that judicial authorization is necessary before an individual may be compelled to participate in a line-up. Davis v. Mississippi, 394 U.S. 721 (1969). The written consent form was thus constitutionally inaccurate and could not serve to validate McCloud's participation in the line-up. Bumper v. North Carolina, 391 U.S. 543 (1968).

The issue, however, as framed by the district court opinion, was to what extent McCloud's previous cooperation with the agents made his written station-house consent superfluous. A second issue, not considered by the district court, is whether McCloud's subsequent cooperation with the agents can conceivably be deemed voluntary once he received the incorrect advice.

A. IN THE ABSENCE OF JUDICIAL AUTHORIZATION, AN INDIVIDUAL MAY NOT BE COMPELLED TO PARTICIPATE IN A LINE-UP.

It is, after Davis v. Mississippi, 394 U.S. 721 (1969), well-established that in the absence of judicial authorization, law enforcement agents may not detain an individual and require him to participate in a line-up (or provide other non-testimonial evidence against himself). As the Supreme Court stated in Davis, in suppressing fingerprint evidence obtained during a judicially unauthorized investigative detention:

> Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrests" or "investigatory detentions."
> ....
> Detentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment. [at 726-7]

Davis' holding has been held applicable to detentions initiated to provide other forms of non-testimonial evidence, Cupp v. Murphy, 412 U.S. 291 (1973) [fingernail scrapings]; cf., United States v. Dionisio, 410 U.S. 1 (1973) [voice exemplars]; United States v. Mara, 410 U.S. 19 (1973) [handwriting exemplars]; including line-up

identifications, United States v. Anderson, 490 F.2d 785 (D.C.Cir. 1974); Biehunik v. Felicetta, 441 F.2d 228 (2nd Cir. 1971).

B. THE GOVERNMENT FAILED TO ESTABLISH MCCLOUD'S VALID CONSENT TO PARTICIPATE IN THE LINE-UP.

In the instant case, there has been no claim of prior judicial authorization to arrest or detain McCloud. Rather, the Government has sought to uphold the line-up proceeding by claiming McCloud voluntarily consented to the line-up. While such consent would, concededly, circumvent a warrant requirement, proof of McCloud's valid consent has not been shown and indeed does not exist in this case.

As the Supreme Court has repeatedly stated, "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given." Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973); Bumper v. North Carolina, supra, at 549. The prosecutor's burden requires proof to what this Circuit has called an "exacting standard:" to satisfy constitutional requirements

the Government must prove "by clear and positive evidence" that the consent was "voluntary, unequivocal, specific and intelligently given." United States v. Como, 340 F.2d 891, 893 (2nd. Cir. 1965); United States v. Bell, 335 F.Supp 797, 803 (E.D.N.Y. 1971). Mere acquiescence to a claim of lawful authority does not constitue valid consent. Bumper, supra.

In light of these constitutional principles, it is clear that any consent to appear in the line-up obtained pursuant to the inaccurate consent form is invalid. Bumper, supra. In the absence of such consent or some form of judicial authorization, McCloud could not be compelled to participate in the line-up. Davis, supra. Accordingly, the line-up proceeding was invalid.

In denying McCloud's motion to suppress the identification evidence, the district court held Davis inapplicable because McCloud voluntarily accompanied the FBI agents to the Hartford police station on the night of the line-up [at A-18]. The court specifically ruled:

> Nothing in Davis or any other case holds that the police, having gained a person's consent to the 'seizure' or'detention' by which he is brought to the site of the line-up, must secure separately his consent to actual participation in the line-up. [Id.]

The appellant respectfully submits that the district court's holding in this regard is clearly in error.

In Cupp v. Murphy, 412 U.S. 291 (1973), the defendant had, as here, voluntarily gone to the police station for questioning about his wife's murder. At the station a police officer observed blood under the defendant's fingernails and proceeded to take skin scrapings for comparison with lacerations on the victim's throat. The Supreme Court held that notwithstanding the defendant's initial voluntary appearance at the police station, when the police detained him at the station to take the scrapings, an investigatory seizure at that point occurred, and Fourth Amendment protections were applicable. The detention was upheld only because the police had probable cause to arrest the defendant. Murphy, supra, at 294-5. In the instant case, there is no claim of probable cause to arrest McCloud prior to the line-up.

The appellant does not dispute the district court's contention that Davis is applicable only to the lawfulness of the seizure that occasioned the participation in the line-up; rather, the appellant submits that under Cupp v. Murphy the unlawful seizure occurred after McCloud had arrived at the police station when he was informed he was no longer free to go but was required to participate in the line-up. Unlike the situation in Dionisio, supra, relied on by the district court, McCloud was not present at the station pursuant to lawful grand jury process compelling him to remain; nor, as in Murphy, supra, did probable cause to arrest McCloud exist. Thus, because the agents had no lawful authority to detain McCloud should he have wished to leave prior to the line-up, when they told him he was required to participate in the line-up, an unlawful seizure or detention at that point occurred.

Although McCloud did not object to the line-up, no inference of consent is constitutionally permissible. McCloud was incorrectly advised that he was required to participate in the line-up, making objection futile. Mere acquiescence to a claim of lawful authority does not constitute valid consent. Bumper, supra. In no case has a defendant's failure to object to a law enforcement

officer's wrongful claim of lawful authority been held to constitute consent. Indeed, in Davis, the fingerprints were suppressed even though the defendant made no objection to the unwarranted detention. Davis, supra, at 729 (Black, J., dissenting). Similarly, in Bumper, the search was condemned even though no objection was made to the police officers' entry into the apartment under the claimed authority of the invalid warrant. In both cases, the officers' improper claim of lawful authority was held to constitute coercion sufficient to invalidate any alleged consent, lack of objection notwithstanding.

It should be noted that the district court made no finding that McCloud specifically consented to the line-up when he agreed to go to the police station,[2] and indeed such a finding would be clearly erroneous. Agent Santacroce testified that he asked McCloud to come to the police station "to possibly appear in a line-up." Agent Millen, who was present with Santacroce at the apartment and was also present later at the police station interrogation,

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2. The district court found that "the defendant consented of his own free will and without intimidation to his accompanying agents of the FBI on November 28, 1973 to the Hartford Police Station for the purpose of establishing -- possibly by appearing in a line-up -- to the satisfaction of the investigating authorities his innocence of the bank robbery under investigation [at A-16]."

testified that the specific consent to appear in the line-up was secured from McCloud in writing at the police station pursuant to the invalid consent form:

Q [By the Government]: You say you asked him to consent [to the line-up]. He did consent?

A [Millen]: And he consented to this line-up.

Q: Was that in writing?

A: Yes it is.

Q: Do you have a copy of that consent?

A: Yes.

Mr. Golub: Your Honor, I'm a bit confused at the time sequence here.

The Court: All right. When was the consent in writing executed?

The Witness: The consent to a line-up?

The Court: Line-up.

The Witness: It was ... the time in the consent to a line-up is 9:30 p.m., 11/28/73.

Q: Where was Mr. McCloud at 9:30 p.m. on that date?

A: At the Hartford Police Department.

[T., p. 35]

From the testimony of the agents, it is apparent that McCloud's specific consent to appear in the actual line-up

was secured at 9:30 p.m. at the police station, although the possibility of a line-up may have been mentioned at the apartment. It is also apparent that it was the understanding of the investigating agents that specific consent to the line-up was obtained only at the station pursuant to the consent form: indeed, the agents did not attempt to arrange the line-up prior to the written consent at 9:30 [T., p. 39].

C. EVEN HAD MCCLOUD PREVIOUSLY CONSENTED TO THE LINE-UP WHILE AT HIS APARTMENT, THE SUBSEQUENT MISADVICE WOULD INVALIDATE THE LINE-UP.

The evidence is thus overwhelming that no specific consent to appear in the actual line-up was obtained from McCloud prior to the invalid written consent. Any other finding is clearly erroneous. However, even assuming, arguendo, McCloud's prior consent at the apartment, such consent would not validate the subsequent proceeding.

Whether or not unequivocal consent was previously obtained, subsequent consent was sought from McCloud at the police station. Even if such additional consent was

not constitutionally necessary,[3] the advice presented to McCloud at the station misstated his rights at that time, even presuming prior consent. Even had he previously consented to the line-up, McCloud was not irrevocably bound by such consent and could not properly be so informed. McCloud was not under arrest prior to the line-up and was legally free to depart the station at any time and/or refuse to participate in the line-up. McCloud was at all times specifically entitled to cease cooperation with the agents by withdrawing any prior consent should he so choose. Miranda v. Arizona, 384 U.S. 436, 473-4 (1966); Cupp v. Murphy, supra. By instructing McCloud that he was required to participate in the line-up, the agents deprived McCloud of his right to cease cooperation.

The right to withdraw consent goes to the very heart of consent law, since valid consent must be totally

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3. The appellant does not concede this. McCloud was not informed he was a suspect in the robbery until he was brought to the station. Given the custodial detention and interrogation that followed, the voluntariness of any prior consent becomes suspect. Both Miranda and Schneckloth v. Bustamonte, supra, indicate that an in-custody consent to appear in a line-up must be preceded by a statement of constitutional rights. The failure to advise McCloud of his right to refuse made his participation in the line-up invalid.

voluntary; it is, of course, obvious that a consent loses its voluntary character if the consenting party wishes to withdraw it. Indeed, in Miranda, the Supreme Court explicitly established the individual's right to terminate cooperation with the police "at any time prior to or during questioning [at 473-4 (emphasis added)]," before or after consent has been given. The Court observed:

> Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has once been invoked. [Id.]

Thus, "opportunity to exercise these rights must be afforded to him throughout the interrogation [Id., at 479]." Accord: Cupp v. Murphy, supra.

The critical nature of McCloud's right to withdraw his prior consent is underscored by the circumstances of his continuing interaction with the agents. At his apartment, McCloud was told only that the agents were seeking information from people who had been seen in Enfield that day; McCloud was not informed he was a suspect and may have viewed participation in a line-up as unlikely or perfunctory in nature. Once at the station,

however, a totally different situation was presented. McCloud was placed in a small interrogation room, was formally advised that he was a suspect in the robbery, and was continually questioned for over an hour in confined quarters by two or more agents.

The realization that he was now considered a suspect and the circumstances of his custodial detention and interrogation might well have induced McCloud to withdraw his prior consent to appear in the line-up.[4] An individual might reasonably change his mind about voluntary cooperation with the authorities when confronted with official suspicion and interrogation, especially when the authorities initially adopted a contrary pose. Most significant in support of this argument (presuming prior consent to the line-up) is the fact that the investigating agents themselves felt it was necessary to obtain consent from McCloud at the station.

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4. McCloud's willingness to speak with the agents at the station does not necessarily indicate a willingness to participate in the line-up. Cupp v. Murphy, supra. There is a signficiant difference in the nature of cooperation involved in submitting to police questioning and submitting to a line-up. In the former, the individual control the extent to which incrimination information may be disclosed; in the latter, the individual has no control over whether he will be incriminated by others' identification of him. Thus, an individual might be willing to undergo questioning but might not wish to submit to a line-up.

Because the agents told McCloud he was required to participate in the line-up, McCloud was denied his right to cease cooperation and the voluntary nature of his subsequent participation in the line-up remains uncertain.

As pointed out, infra, at pps. 19-20, no inference of voluntariness may be drawn from McCloud's failure to object to the line-up. Davis, supra; Bumper, supra. In the face of the form's insistence, objection was futile. For constitutional purposes, there is no difference between submitting to a search based upon a law enforcement officer's claim of a valid warrant, as in Bumper, and submission to a line-up based upon an agent's claim of authority to require submission, as here. In both cases, there is nothing but acquiescence to a claim of lawful authority.

As the Supreme Court stated in Bumper in analagous circumstances:

> When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion -- albeit colorably lawful coercion. Where there is coercion, there cannot be consent. Bumper, supra.

Thus, even had McCloud specifically consented at his apartment to the line-up, the subsequent misadvice as to his right to withdraw the consent would invalidate the line-up proceeding.

V. ARGUMENT: GOVERNMENT AGENTS CONDUCTED AN UNLAWFUL WARRANTLESS SEARCH OF MCCLOUD'S BASEMENT, AND THE EVIDENCE SEIZED THEREFROM WAS IMPROPERLY ADMITTED AT TRIAL.

The second issue presented in this appeal is whether the evidence discovered in McCloud's basement (the money and the pistol) was improperly seized and thus improperly admitted into evidence at trial. Specifically, this Court must decide whether McCloud or someone else with authority to do so consented to the warrantless search of the basement area.

Shortly after his arrest on November 28, 1973, McCloud executed a written consent to search his apartment at "11 Winter Street, first floor." Ms. Edwards, after consulting with her husband, executed a similarly-worded consent to search the first floor of the apartment. Upon securing the written consents, three agents and Ms. Edwards went to 11 Winter Street. After a search of the first floor area proved negative, the agents noticed the basement stairs and proceeded to search the basement, finding approximately fourteen thousand dollars in cash and a pistol. The agents testified, although Ms. Edwards disputed, that Ms. Edwards gave oral consent to the basement search.

The district court upheld the search of the basement on two grounds. First, the court held McCloud himself consented in writing to the search of the basement when he executed the consent form. Alternatively, the court held that McCloud's wife had the authority to consent and did so orally consent to the basement search.

A. MCCLOUD DID NOT CONSENT TO THE SEARCH OF THE BASEMENT.

The district court's first ground for upholding the basement search -- McCloud's purported consent -- is startling. The documentary and testamentary evidence presented below demonstrated beyond all doubt that McCloud expressly limited his consent to a search of the first floor area. Not only is the district court's conclusion directly contrary to the evidence, it is a rationale for the basement search not even advanced by the Government in argument below.[5]

At the hearing below, the Government presented McCloud's written consent to search his premises. Assuming this consent

5. In its brief in opposition to McCloud's motion to suppress the money and the pistol, the Government argued: The search of the basement was lawful because a voluntary consent was given by a third party in control of the premises [App., Ex. 8, p. A-41]. Nowhere in the brief did the Government argue McCloud's written consent conferred authority to search the basement.

to be valid,[6] McCloud was undeniably entitled to so limit the extent of his consent and thereby bind the investigating agents. United States v. Dichiarinte, 445 F.2d 126, 129-130, n. 3 (7th. Cir. 1971). No evidence of further consent to search by McCloud was presented.

The evidence presented by the Government underscored McCloud's intention to limit the search to the first floor of the apartment. Agent Miller testified that McCloud specifically excluded the basement area from the description of his premises given to Miller at the time of the consent:

> Q [By the Government]: Is it normal procedure to question an individual consenting to search form with regard to his interest in the property being searched?
>
> A [Miller]: Yes, sir.
>
> Q: What's the purpose of that questioning?
>
> A: To specify the area that is to be searched.
>
> Q: Was Mr. McCloud questioned with regard to that area?
>
> A: Yes, he was.
>
> Q: And what did he state?
>
> A: He said that he resided at the first floor of that apartment building. And then I questioned him about the other areas in the building that he may have control of. And at that point I specifically mentioned the basement, because in apartment buildings they are divided into various apartment portions and under individual control.

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6. McCloud does not concede this. Because the basis for McCloud's arrest was the unlawful line-up identification, there was no probable cause for his arrest. Since McCloud's consent to search was secured immediately subsequent to this illegal arrest, it was invalid as the fruit of an illegal arrest. McCloud "hardly had time to clear and arrange his mind between his custody and being charged ... and his 'consent.'" Leavitt v. Howard, 332 F.Supp 845 (D.R.I. 1971); Wong Sun v. United States, 371 U.S. 471 (1963)

And he said that was not the case in this building, that there was nothing in the basement. And that he had no control over anything in the basement, that there were no cubicles, and as far as he knew there wasn't anything of that nature in the basement. And the only place that he had any place where he resided or control over was the first floor apartment.

[T., p. 128]

Accordingly, it was Miller's understanding that McCloud had consented to a search of only the first floor area at 11 Winter Street:

Q [By Mr. Golub]: ... So, in other words, the only authority that Mr. McCloud gave you was to search the first floor of 11 Winter Street and his automobile, is that correct?

A: That's all he had control over.

Q: I'm not asking you that question, sir. I'm asking you if that is what he gave you authority to search?

A: Yes.

Q: Are you familiar with where the items at issue in this motion were found?

A: I am.

Q: Were they found on the first floor of 11 Winter Street?

A: They were not.

[T., pps. 129-130]

....

Q: So again it [the consent to search] was limited to the first floor of 11 Winter Street, is that correct?

A: Yes, that's what the form said.

[T., p. 127]

The agents conducting the search similarly believed McCloud's (and Edwards') consent to search was limited to the first floor area. Agent Brandon expressly testified that the written consents were so limited [T., p. 150], and Agent Santacroce agreed that he had sought permission from Eva Edwards to "extend" the original consent [T., p. 155]. Indeed, the investigating agents must have believed their authority to search was limited to the first floor by the written forms because they believed it necessary to secure additional oral permission from Eva Edwards to search the basement.

Eva Edwards testified that she and McCloud deliberately intended to limit the search to the first floor when they executed the written consents:

Q [By Mr. Golub]: Now in this consent form that you executed, Eva, did you -- when you wrote 11 Winter Street, first floor, was that intended to limit the search to the first floor?

A [Edwards]: Right. They asked me to search the apartment. That's what I gave my consent.

Q: And did you know that Leon had agreed only to a search of the first floor?

A: Right.

[T., pps. 163-4]

It should be noted that Edwards consulted with her husband before signing the consent to determine his intentions. Both McCloud and Edwards described the area to be searched in identical terms.[7]

In finding McCloud consented to the basement search, the district court thus disregarded the precise, uncontradicted terms of the written consent form, McCloud's attempts to exclude the basement from the description of his premises, the clear understanding of all the investigating agents as to the limits of the consent, the fact that the agents sought additional consent to search the basement, the testimony of Eva Edwards and McCloud as to their intentions, and the position taken by the Government in argument below.

The burden is not on McCloud to show he did not consent to the basement search. Rather, it is the Government's heavy burden to show an unequivocal consent by McCloud to the search of the basement. Schneckloth, supra; Bumper, supra. The appellant respectfully submits that the district court's finding that McCloud consented to

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7. While McCloud's testimony is less clear, primarily because McCloud became somewhat agitated while testifying, he explicitly testified he intended to limit the search to "the apartment [T., p. 173]." McCloud's prior evasions concerning the basement, and Ms. Edwards' use of the same word to designate the first floor area, indicate McCloud's intention to limit the search to the apartment area on the first floor.

McCloud's evasions on November 28, 1973 notwithstanding, it is clear that on that date the basement was a protected area. The testimony revealed the basement was used only by McCloud and his wife for storage purposes in connection with their lease. See United States v. Gargio, 456 F.2d 584 (2nd. Cir. 1971). Furthermore, Agent Brandon testified he considered the basement area to be part of the apartment complex. [T., p. 142] See Care v. United States, 231 F.2d 22, 25 (10th. Cir. 1956).

the basement search is clearly erroneous and must be overturned.

B. EVA EDWARDS HAD NO AUTHORITY, SUFFICIENT TO BIND MCCLOUD, TO CONSENT TO THE SEARCH OF THE BASEMENT.

The district court alternatively upheld the basement search as pursuant to the valid third party consent of McCloud's co-tenant, Eva Edwards. The district court held Edwards voluntarily consented to a search of the first floor and the basement of the apartment. Assuming, arguendo, the validity of such contentions,[8] such consent was not constitutionally sufficient to uphold the search as against McCloud.

Although it is, concededly, now established that a third party having joint access or control over premises has a general authority to consent to a search of common ground sufficient to bind an absent co-tenant, United States v. Matlock, 415 U.S. 164 (1974), 14 Crim. L. Rptr 3108 (2/20/74), it has never been held that such third party consent is valid against the co-tenant in the face of the latter's express written disapproval of such a search. In fact, as

8. The appellant does not concede this. See Part V-C, infra, p.38.

Matlock makes clear, such a holding would be inconsistent with the premises on which the validity of third party consent is based.

In Matlock, where a third party consent was upheld by the Supreme Court, the Court was careful to note that the doctrinal underpinnings of such consent do not stem from traditional property law concepts of common possession; rather, drawing implicitly on the Katz "reasonable expectation of privacy," the Court stated that the mutual use of property makes it

> "... reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched."

[Matlock, supra, at ___, n. 7 (emphasis added).] 3110,

Similarly, the Court explained its prior holding in Frazier v. Cupp, 394 U.S. 731 (1969), where a co-user's consent to search a shared duffel bag was upheld, as a result of the fact that "Frazier was held to have assumed the risk that his cousin would allow someone else to look inside" the bag. [Id.]

In the instant case, it cannot be held that McCloud did, in fact, assume the risk of a basement search. McCloud expressly disapproved such a search, a disapproval communicated directly to the Government agents (on the consent form), and to his wife (in their conversation before she executed her consent form). In view of the fact that McCloud was not permitted, by virtue of his arrest, to accompany the agents in their search, it is clear that he did everything in his power to prevent a basement search. As Chief Judge Swygert of the Seventh Circuit Court of Appeals has observed,

> "Basic to the third party consent rationale is the premise that the absent party might, were he present, consent to the search, in which event no constitutional rights would be violated." United States v. Stone, 471 F.2d 170, 177 (7th. Cir. 1972) (Swygert, C.J., dissenting) /dissent adopted United States v. Robinson, 479 F.2d 300, 303 (7th. Cir. 1973)/

Here, in the face of McCloud's stated feelings, it is not reasonable to assume that, had he been present, he would have permitted the basement search.

Courts faced with a defendant's prior or contemporaneous

objection to a search have consistently declared invalid a co-tenant's otherwise valid consent. Lucero v. Donovan, 354 F.2d 16, 21 (9th. Cir. 1965); United States v. Robinson, supra; United States v. Poole, 307 F.Supp 1185, 1190 (E.D.La. 1969); Dorsey v. State, 232 A.2d 900, 2 Md.App 40 (1967); Tompkins v. Superior Court, 378 P.2d 113, 27 Cal. Rptr 889 (1963) [Traynor, C.J.].

Also relevant to the validity of a third party consent are the whereabouts of the absent party and the cause of his absence. United States v. Robinson, supra; United States v. Stone, supra; 79 Harv. L. Rev. 1513, 1519 (1966); 39 U.Cin.L.R. 807, 814 (1970). As one commentator has noted, to prevent deliberate attempts to circumvent a defendant's rights, "in order to justify a [third party consent] search, the police must show that the defendant was genuinely inaccessible and that the nature of the items sought was such that immediate action was reasonably necessary." 79 Harv. L. Rev., supra.

In this case, as in Stone, supra, McCloud was absent because he was in Government custody; thus, not only was McCloud reasonably available to give his consent (perhaps all of five minutes away -- Winter Street to Morgan Street, the site of the police station),

but McCloud's absence was directly attributable to the agents themselves. "Without the slightest difficulty the arresting officers could have requested his consent to search. They did not, perhaps in fear of a negative reply." Stone, supra.

In the instant case, McCloud cannot be held to have assumed the risk of the basement search. He did everything in his power to limit the search to the first floor area. McCloud was not present at the search to object to the extension of the original consent because he was being held, perhaps illegally, in custody at the police station. In addition, McCloud was easily accessible by telephone or by brief automobile ride for further requests to consent to the search of the basement.

No court has ever interpreted the third party consent doctrine to permit Government agents to circumvent the expressed exercise of constitutional rights by an absent co-tenant, especially when the co-tenant's absence is caused by the agents and when the co-tenant is easily accessible. Ms. Edwards' alleged consent to search the basement cannot, therefore, be held to bind McCloud, and the property seized in the basement should not have been admitted into evidence at trial.

C. EVA EDWARDS DID NOT VOLUNTARILY CONSENT TO THE SEARCH OF THE BASEMENT.

1. Eva Edwards' Written Consent Was Improperly Obtained And Invalidates Any Subsequent Oral Consent To Search The Basement.

Assuming, arguendo, that Ms. Edwards had authority to bind McCloud to a search of the basement, the Government must still prove that such consent was voluntarily given. Schneckloth, supra. The determination of the voluntariness of Edwards' consent must be made on the basis of the totality of the circumstances and, in this case, will therefore involve a consideration of Ms. Edwards' original written consent as well as any subsequent oral consent.

Perhaps the key to an evaluation of Ms. Edwards' original willingness to permit a search of the apartment is the undeniable fact that she was not merely involved in the agents' investigation as a co-resident of McCloud's apartment, but rather was perceived as a possible participant in the robbery. Agent Santacroce testified that he suspected Ms. Edwards might have been involved in the robbery, and, upon her arrival at the police station, he actually took her into one of the interrogation rooms for questioning. Santacroce thought it a good possibility that Ms. Edwards might have driven the getaway car and, in addition to other questions, so inquired.

[T., p. 24] Indeed, at the hearing, the Government attorney specifically indicated criminal charges might be brought against Ms. Edwards. [T., p. 86]

In evaluating the voluntariness of Ms. Edwards' consent, it is necessary, therefore, to assess her consent as if it were being used to validate a search directed against her as well as her husband. Equally important, the overall investigation that evening must be viewed as an investigation of Ms. Edwards as well as McCloud.

From these perspectives, it is evident that Ms. Edwards' written consent cannot be deemed voluntary. Although Ms. Edwards went to the police station voluntarily, once there she was questioned several times by the agents. [T., p. 24, 145, 168] Despite the fact that the agents considered her a possible suspect, such in-custody interrogation was not preceded by advice to Ms. Edwards of her right to remain silent or her right to the assistance of counsel. [T., p. 23] Indeed, notwithstanding Ms. Edwards' statement to Santacroce that she did not wish to answer further questions [p. 168] she was, in fact, subsequently approached by

other agents for further interrogation [T., p. 160, 168].

By itself, the agents' continued interrogation of Ms. Edwards after she told them she did not wish to answer further questions invalidates, as a matter of law, the agents' subsequent request for her consent to search the apartment. Miranda, supra, at 473-4.

Furthermore, Ms. Edwards certainly did not receive sufficient advice as to her rights when approached to sign the consent form. Agent Brandon testified that, upon requesting the consent to search, he informed Ms. Edwards of the one right listed on the form, the right to refuse consent in the absence of a search warrant. [T., p. 148] No other advice was ever given to Ms. Edwards. [Id.] Not only would the advice given be insufficient to validate interrogation, but, more important, such limited advice did not fully advise Ms. Edwards of her rights with respect to the requested consent.

At no time was Ms. Edwards informed of her right to the assistance of counsel or of the fact that anything seized during the search could and would be used against her. No in-custody consent to search, especially from an actual suspect, can be valid in the absence of advice as to these two fundamental rights. While Schneckloth, supra, at 241, leaves this question open (although clearly hinting that an in-custody consent requires proper advice), the Ninth Circuit Court of Appeals has, since Schneckloth, specifically required warnings

to an in-custody individual, United States v. Watson, 14 Crim. L. Rptr. 2299 (1/16/74), and this Circuit has recently indicated it too may adopt a similar rule, United States v. DeMarco, 488 F.2d 828, 831 (2nd. Cir. 1973). See Schneckloth, supra, at 241, n. 29.

Although the exact scope of the required warnings has not yet been precisely defined, since the same considerations that underlie Miranda provide the basis for the warning requirement, it would seem clear that an in-custody individual must be informed of his right to counsel, his right to remain silent, his right to refuse consent, and of the fact that anything found during the search can be used against him. Thus, in United States v. Pelensky, 300 F.Supp 976, 979 (D.Vt. 1969), one district court in this Circuit invalidated a consent to search because the agents failed to inform the in-custody defendant of his right to counsel. Similarly, in United States v. Fisher, 329 F.Supp 630, 635 (D.Minn. 1971), a defendant who was not informed of the consequences of his consent could not voluntarily permit a search.

The repeated failure of the agents to warn Ms. Edwards of her rights, first when interrogation was initiated and later when the consent was requested thus invalidates, as a matter of law, any

consent she may have executed. Since no further advice was given to Ms. Edwards at the time of the alleged oral consent, and since, in any event, the oral consent was a direct result of the original written consent, the subsequent oral consent is invalid and cannot justify the search of the basement. Wong Sun, supra.

2. After Ms. Edwards' Expressly Limited Her Station-House Written Consent To Search The Apartment, The Agents Were Precluded, As A Matter Of Law, From Seeking Further Expanded Consent To Search.

Assuming, arguendo, Ms. Edwards' written station-house consent to search was voluntary, the search of the basement would still require her additional valid permission. As a matter of law, however, once Ms. Edwards limited her original consent, subsequent consent cannot be solicited from her by law enforcement agents. Miranda, supra, at 473-4.

Ms. Edwards' original decision to waive her Fourth Amendment rights was a limited one, made after considered deliberation with her husband and reflecting (arguendo) the extent of her voluntary response to the agents' request. Once this decision had been made, the agents were bound by the limits imposed and could not request further waiver.

Miranda would once again supply the applicable law. In Miranda, in foreseeing an analagous situation, the Supreme Court held that once an individual has, in any way, indicated his reluctance to cooperate, the police could not make further attempts to secure the desired waiver. Similarly, Ms. Edwards' refusal to waive fully her right to refuse a search acts as a bar to further Government solicitations. Miranda, supra, at 473-4. Accordingly, any oral consent to search the basement was invalid.

VI. CONCLUSION.

For the foregoing reasons, Woolette's identification testimony and the tangible evidence seized from McCloud's basement were improperly admitted into evidence at trial. Accordingly, appellant's conviction must be reversed.

THE APPELLANT

BY: David S. Golub

DAVID S. COLUB, Esq.
1800 Asylum Avenue
West Hartford, Conn. 06117

His Attorney

CERTIFICATE OF SERVICE

A copy of the foregoing has been mailed, postage pre-paid, to Peter Dorsey, Esq., United States Attorney, 450 Main Street, Hartford, Connecticut, this 5th day of May, 1975.

DAVID S. GOLUB, Esq.

In The

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 75-1061

APPEAL

from the

UNITED STATES DISTRICT COURT

for the

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,

-APPELLEE,

vs.

LEON EUGENE MCCLOUD,

DEFENDANT-APPELLANT

DEFENDANT-APPELLANT'S APPENDIX

Submitted by:

DAVID S. GOLUB, Esq.
1800 Asylum Avenue
West Hartford, Conn. 06117

Attorney for Defendant-
Appellant

LIST OF EXHIBITS

A-1

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

M. JOSEPH BLUMENFELD

H 610

D. C. Form No. 100 Rev.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES vs. LEON EUGENE MC CLOUD	For U.S.: Stewart H. Jones, USAttorney ~~RICHARD R. ROEDER~~ 450 Main St., Hartford, Conn. A. Dabrowski, Asst. U.S. Att. For Defendant: David S. Golub Appt. U-Conn Legal Clinic 1800 Asylum Ave. West Hartford, Conn. 523-4841, Ext. 385

STATISTICAL RECORD	COSTS			DATE	NAME OR RECEIPT NO.	REC.		DISB.	
J.S. 2 mailed	Clerk								
J.S. 3 mailed	Marshal								
Violation U. S. Code	Docket fee								
Title 18									
Sec. 2113(a) & 2113(b)									

PROCEEDINGS

The Grand Jury at Hartford returned a True Bill of Indictment charging violation of 18 USC 2113(a) in ct. 1 - by force and violence and by intimidation, did take money belonging to and in the care of a federally-insured institution; and 18 USC 2113(b) in ct. 2 - did take and carry away, with intent to steal and purloin, from a federally-insured institution, money belonging to and in the care of said bank. Bench Warrant to issue (as defendant is incarcerated). To be put to plea on 12/17/73.(Blumenfeld,J.)m-12/7/73

12/7 Bench Warrant issued in duplicate and with certified copy of the indictment handed US Marshal for service.

12/17 PLEA of not guilty entered to all counts. Defendant in custody. Standing Order of Court re Discovery, Bill of Particulars, etc. invoked by Court - Two weeks to comply. Atty. Aaron claimed that he represented Deft. before Magistrate - Defendant to secure new counsel. (Blumenfeld,J.)m-12/20/73

12/19 Marshal's Executed Return Filed. (Warrant for Arrest of Deft.)

12/26 Copy of letter from R.C. Roeder, Asst. U.S. Atty., advising that Govt. is now ready to proceed to trial in this case, filed.

CONTINUED

A-2

A vs. Leon Eugene McCloud Page 2 Criminal H-610

DATE 974	PROCEEDINGS
/19	Ruling on Motions to Suppress, Filed, (Blumenfeld, J.)m-9/23/74. "The defendant's motions to suppress are denied." Copies sent to Attorneys Dabrowski and Golub.
9/19	Notice of Readiness, filed by the Government.
10/23	Call of Jury Trial List - Trial 12/10/74.(Blumenfeld,J.)m-10/24/7
12/10	JURY TRIAL: Motions of Def. to Dismiss, Denied - Panel of 39 Jurors report and sworn on VoirDire - Motion of Def. for Individual Voir Dire, Denied - Panel of 12 Jurors and one alternate drawn and sworn - Def's. Motion for Sequestration of Witnesses, Granted - Def's. Motion (renewal) for Identification and Suppression, Denied - Court Exh. A, filed - 7 Govt. Witnesses, sworn and testified - Govt. exh. 1 thru 14 marked for identification - Govt. exh. 1,5,5a, 4b & 4c made full exhibits - Govt, exh. 13 to be attached to exh 11 - Def. exh. A, filed - Govt. exh. 4 remarked for identification as 4A, 4B & 4C. Govt. request to Charge, filed. Court adjourned at 5:00pm.(Blumenfeld, J.)m-12/12/74
12/11	JURY TRIAL CONTINUES: 13 Jurors report - 2 Witnesses previously sworn recalled and testified - 5 Govt. Witnesses, sworn and testified - Govt. exh. 15,16,17 & 18, filed. - Govt. exh. 2,3,4A,7, and 10 thru 14 made full exhibits - Deft. exhibits B thru G, filed - Govt. rests at 12:45pm - Deft. rests at 2:08pm - Govt. summation from 2:10pm thru 2:22pm - Def. summation from 2:22pm thru 2:50pm - Govt. rebuttal from 2:50pm thru 2:56pm - Court charges from 3:15pm thru 4:08pm - Jury retires at 4:10pm - Def. notes exceptions to charge by Court - Exception Denied - Indictment, Stipulation (unsigned) and Exhibits brought to Jury by Clerk & Marshal at 4:13pm - Jury returns at 4:55pm with a verdict of GUILTY to counts 1 and 2 - Frances S. Holder, Forelady - Verdict verified and ordered recorded. No request to poll jury - (Blumenfeld,J.)m-12/13/74
12/12	Marshal's executed return, filed. (Subpoena to Produce Doc. or Obj
1975	
1/24	Court Reporter's Notes of Proceedings held on December 10 and 11, 1974, filed in Hartford. (Collard, R.)
2/3	DISPOSITION:(two counts) - five yrs. imprisonment on each count to run concurrently, execution suspended, deft. placed on probation for period of five years.(Blumenfeld,J.)
2/7	Judgment and Order of Probation, filed.(Blumenfeld,J.)m-2/10/75 Two attested copies handed US Probation Officer in Hartford.
2/13	Notice of Appeal, filed. Copies sent to Attys. Dabrowski, and Golub.
2/13	Certified copy of Notice of Appeal and docket entries sent to USCA.
2/21	Acknowledgement from USCA for documents mailed on 2/14/75, filed.

A-3

vs. Leon Eugene McCloud — Criminal H-610

DATE	PROCEEDINGS
12/27/73	Letter advising that Govt. is ready for trial, filed.
1974	
1/21	Defendant's Motion For Review of Conditions of Release, filed.
1/21	Appearance of David S. Golub, Esq. to represent Deft., filed.
1/23	Magistrate's papers, filed. (Parker, Mag.). Record of Proceedings, Warrant of Arrest and Complaint.
1/23	Endorsement entered on Deft's. Motion For Review of Conditions of Release, "1/23/74 In the absence of Chief Judge Blumenfeld, motion granted upon hearing counsel for both parties fully in chambers in that the bond is hereby reduced to $1,000.00 with corporate surety; said bond may be executed before any available Judge or Magistrate."(Latimer, M.a m-1/23/74 Copies disbursed to U.S. Marshal, Asst. US Atty. Dombrowski, and Atty. Golub.
1/28	Mag. Bond, filed ... $1,000.00 with surety which is Rose S. Carbone.(Parker,Mag.)
1/30	Defendant's Motion to Suppress Identifications and Motion To Suppress as Evidence and For Return of Property, filed.
3/4	Defendant's Motions 1 and 2 continued for two weeks. (Blumenfeld, J m-3/6/74.
3/18	Hearing on Deft's. Motion To Suppress Identifications and Motion to Suppress As Evidence and For Return of Property - 2 Govt. Witnesses sworn and testified - Govt. Exh. #1, filed - Deft. Exh.A, filed. - Defendant, sworn and testified - Court orders limitation on use of Defendant's testimony re this hearing.(Blumenfeld,J.)
3/19	Hearing on Motions to Suppress Identification and To Suppress Evidence and for Return of Property continues --3 Defendant's Witnesses sworn and testified - Deft. Witness previously sworn, resumed stand and testified - Deft. exh. B, filed - Govt. Witness previously sworn recalled and testified - 2 Govt. Witness sworn and testified - Govt. exhibits 2,3,4 & 5, filed. Decision Reserved - Briefs by Defense and Government due 4/9/74.(Blumenfeld, J.)m-3/20/74
3/20	Court Reporter's Notes of Proceedings held on December 17, 1973, filed in Hartford. (Collrd, R.)
4/9	Court Reporter's Transcripts of proceedings held on March 18 and 19, 1974 (two vols.), filed in Hartford. (Collard,R.)
4/19	Court Reporter's Sound Recording of Proceedings held on December 17, 1973, filed in Hartford. (Collard, R.)
4/10	CJA 21 Executed (Blumenfeld, J.) authorizing Paul Collard, Reporter, to prepare transcript.
4/16	Opposition To Defendant's Motion To Suppress Identifications; and Opposition To Defendant's Motion To Suppress Evidence and For Return or Property, filed.
4/15	CJA 21 executed (Blumenfeld,J.) authorizing payment of $180.00 to Paul A. Collard, C.R. and mailed to A.O. for payment.
5/8	Court Reporter's Notes of Proceedings held on March 18, 1974, filed in Hartford. (Collard, R.)
5/8	Court Reporter's Notes of Proceedings held on March 19, 1974, filed in Hartford. (Collard, R.)
5/10	Order on Motion for Appointment of Counsel filed and granted, along with Financial Affidavit, CJA 23. (Blumenfeld, J.)
5/29	CJA 20 executed (Markowski, C.) appointing David S. Golub to represent Deft.

CONTINUED

5

4-4

FD-394 (8-21-68)

YOUR RIGHTS AT A LINEUP

Place Waterbury Conn.

Date 11-29-73

Time 9:30

You have been asked to participate in a lineup. At the lineup, you will be obliged to stand in a line with other persons, to speak, to move in a certain manner, and/or to put on or remove certain clothing for the purpose of enabling witnesses to make an identification. You are required to participate in the lineup but you are entitled to have an attorney of your own choosing present. If you cannot afford an attorney but wish to have one present at the lineup, the lineup will be delayed until an attorney has been appointed by a court to represent you. Having an attorney present will help you in the preparation of your defenses to any identification which may be made at the lineup.

However, you may waive your right to have an attorney present at the lineup and consent to participate in the lineup in the absence of an attorney.

WAIVER AND CONSENT

I have (read) (had read to me) this statement of my rights and I understand what my rights are. I am willing to participate in a lineup in the absence of an attorney. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed [signature]

[signature]

Witness: [signature] Special Agent FBI New Haven 11-29-73

Witness: [signature], Special Agent FBI, Hartford, Conn. 11/29/73

Time: 9:30

FD-26 (Rev. 9-11-52) A-5

Nov 28, 1973
(Date)

Hartford Conn
(Location)

I, Leon McCloud, having been informed of my constitutional right not to have a search made of the premises hereinafter mentioned without a search warrant and of my right to refuse to consent to such a search, hereby authorize

Harry P. Ro[illegible] II, and

D[illegible] K[illegible], Special Agents

of the Federal Bureau of Investigation, United States Department of Justice, to conduct a complete search of my premises located at

[illegible] St. [illegible] Hartford Conn [illegible]
[illegible] 1973 [illegible] [illegible] [illegible] L.P. [illegible]

These agents are authorized by me to take from my premises any letters, papers, materials or other property which they may desire.

This written permission is being given by me to the above-named Special Agents voluntarily and without threats or promises of any kind.

(SIGNED)

Leon McCloud

WITNESSES: Phillip Kr[illegible], Special Agent, FBI, Hartford, Conn. 11/28/73

David W. Sp[illegible], Special Agent FBI New Haven Conn. 11-28-73

A-61

11/28/73
(Date)

Hartford, Conn
(Location)

I, Ava Edwards, having been informed of my constitutional right not to have a search made of the premises hereinafter mentioned without a search warrant and of my right to refuse to consent to such a search, hereby authorize Harvey B Pressler III, and Philip Kinnan, Special Agents of the Federal Bureau of Investigation, United States Department of Justice, to conduct a complete search of my premises located at 11 Windsor ST. 1st Floor.

These agents are authorized by me to take from my premises any letters, papers, materials or other property which they may desire.

This written permission is being given by me to the above-named Special Agents voluntarily and without threats or promises of any kind.

(SIGNED) Ava Edwards

WITNESSES: Philip Kinnan, Special Agent FBI, Hartford, Conn. 11/28/73

David W. Spidle, Special agent FBI Hartford 11/28/73

SA Harvey Pressler FBI Hartford 11/28/73

4-7

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
V.	:	CRIMINAL NO. H-610
LEON EUGENE MC CLOUD	:	

RULING ON MOTIONS TO SUPPRESS

The defendant is charged with the armed robbery of a federally insured savings bank in Enfield, Connecticut, on November 28, 1973. On that evening following the robbery, the defendant was questioned by F.B.I. agents at his home, and accompanied these agents to the Hartford Police Station, where, following his receipt and signature of Miranda warnings, he was interrogated and then placed in a line-up. The defendant was positively identified at the line-up by an employee of the robbed bank. The defendant was then placed under arrest and asked to consent in writing to a search of his apartment and automobile. The defendant executed a written consent form, as did his common law wife and co-tenant. She had also gone with the F.B.I. agents to the Hartford Police Station and then accompanied back to her apartment the F.B.I. agents who executed the search warrant. Over thirteen thousand dollars in wrappers from the robbed bank and a semi-automatic pistol were found in the basement of the defendant's apartment. Shells fitting the pistol were found in the defendant's automobile.

A-8

In the context of these undisputed facts, which were established at an evidentiary hearing on the defendant's motions, there must be resolved conflicts in the evidence as to the voluntariness of the defendant's consent to accompany the agents to the Hartford Police Station, the voluntariness of his consent to appear in the line-up, the voluntariness and scope of his consent to the search of his apartment and automobile, and the existence of his wife's oral consent to a search of their apartment's basement. Based on his view of the evidence, the defendant argues that his trip to the police station and his subsequent participation in the line-up were without his valid consent, probable cause, or prior judicial authorization. The defendant would thus have his identification at the line-up suppressed as the fruit of an illegal search and seizure.[1/] The defendant would also have

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1/ The defendant's motion to suppress his identification at the line-up was premised on three grounds: (1) that the line-up was conducted in an impermissibly suggestive manner; (2) that the line-up was the fruit of an illegal arrest; and (3) that the defendant was denied his Sixth Amendment right to the assistance of counsel during line-up. The defendant's post-hearing brief has abandoned two of these grounds, apparently in candid recognition of their lack of legal and factual merit. The defendant no longer argues that the line-up was impermissibly suggestive, and the Court finds on the basis of the evidence adduced at the hearing that the line-up was not impermissibly suggestive. The defendant has also abandoned his contention that he had a right to counsel at the line-up. The Supreme Court has, of course, squarely held that there is no right to counsel at a line-up conducted, as here, in advance of the defendant's being indicted or otherwise formally charged with a crime. Kirby v. Illinois, 406 U.S. 682 (1972). The only ground the defendant now relies on to invalidate his

the fruit of the searches of his car and apartment suppressed as tainted by the allegedly illegal line-up, both directly in that absent the identification the agents would not have sought to search, and indirectly in that the identification was the only probable cause for the defendant's arrest. The defendant contends that for lack of probable cause and for lack of a warrant this arrest was illegal, and that the coercive atmosphere created by the illegal arrest vitiated the voluntariness of the defendant's consent to the searching of his car and apartment. Finally, the defendant maintains that independently of the taint of the line-up and the arrest the search of the basement of the defendant's apartment went beyond the scope of his consent, and was not otherwise validated by warrant, consent, or exigent circumstances.

I

Two F.B.I. agents testified about their questioning of the defendant at his apartment prior to his accompanying them

1/ cont'd

identification is a modified version of his claim that the line-up was the fruit of an illegal arrest. While the defendant does not dispute the evidence adduced at the hearing that he was not formally arrested until after his identification at the line-up, he now contends that he was coerced into accompanying the F.B.I. agents to the Hartford Police Station so as to appear in the line-up, by virtue of which coercion he was illegally seized, even if not formally arrested. The defendant argues that this allegedly illegal seizure rendered his subsequent participation in the line-up an illegal search.

to the Hartford Police Station. Agent Santacroce testified that he arrived at the defendant's apartment along with three other agents and an Enfield police officer at about 7:30 p.m., four and a half hours after the robbery. They considered the defendant their best lead for information on the robbery; they had not yet focused on him as a prime suspect. Their knocks at the apartment were answered by Ms. Eva Edwards, the defendant's co-tenant and common law wife. She denied having seen the defendant recently or knowing his whereabouts. While she was pursuing this line the defendant appeared from within the apartment and identified himself. No warnings of constitutional rights were given the defendant, who was asked if he had knowledge of the robbery. After about fifteen minutes, the defendant was asked to go to the police station to possibly appear in a line-up which might clear him of involvement in the robbery. The defendant first said nothing, then said he would be glad to go. Agent Millen gave substantially similar testimony. He added that the agents were admitted by Ms. Edwards into the kitchen of the apartment, into which the defendant appeared from the living room without having previously been seen by the agents. Agent Millen testified that the defendant consented immediately to the trip to the police station for a line-up, and that he did not at any time indicate he did not wish to go. The defendant was not searched during the course of the interview in his apartment.

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The defendant gave a differing version of these events. He said six or seven agents entered his apartment and questioned him accusatorily about the robbery. He was asked to go downtown to police headquarters to clear things up, since he admittedly had been in Enfield that day and the agents thought he might have seen something, but no mention was made of a line-up. He said he was too tired to go down that night and would do so the next day. The agents became insistent and commanding in requesting his immediate presence at the police station, so he agreed to go with them. Although no threats were made, he was afraid of he or his wife being beaten, as he had heard of the police doing in some cases.

Ms. Edwards testified that four agents arrived at her apartment and were admitted to the kitchen, while two more waited outside the apartment. The defendant started to enter, but the agents, thinking a neighbor was at the door, asked for privacy. Ms. Edwards admitted to lying to the agents for five or ten minutes about her lack of knowledge of the defendant's whereabouts because "I'm not going to, like, get involved in nothing I don't know what's happening." Finally the defendant did come in. Ms. Edwards then took her two children to a neighbor's apartment, and gave the neighbor $610. After she returned to her apartment she heard the agents ask the defendant to go to the police station that night. The defendant indicated he would rather wait until the morning, but the

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agents persisted and the defendant acquiesced. She heard no threats, nor was the defendant arrested.

Mrs. Jones, the neighbor sought out by Ms. Edwards, testified that Ms. Edwards had rushed in with her children and the money. Mrs. Jones threw the money in a drawer and--apparently abandoning the children who were supposedly the object of Ms. Edwards' concern--rushed after Ms. Edwards back to her apartment, where although she "wasn't really listening" she heard the police ask the defendant to go to headquarters with them, heard him ask for them to wait until tomorrow, and heard them insist until he yielded.

The Court credits the testimony of Agents Santacroce and Millen over the testimony of the defendant, his wife, and Mrs. Jones. The defendant and his wife, who although not charged has been said by the prosecuting Assistant United States Attorney to be possibly subject to criminal charges, have obvious motives to lie. Ms. Edwards and Mrs. Jones both lacked credibility in their manner while testifying, and failed to offer candid explanations for inconsistencies and improbabilities in their stories.

It remains for the Court to determine the voluntariness of the defendant's consent to accompany the agents to the Hartford Police Station. The context for this determination are the facts set forth in the testimony of Agents Santacroce and Millen, which facts are found by the Court to be true.

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The voluntariness of a waiver of a Fourth Amendment right--here the right not to be taken into police custody without a warrant or probable cause--"is a question of fact to be determined from all the circumstances." Schneckloth v. Bustamonte, 412 U.S. 218, 248-249 (1973).

Among the circumstances to be considered here are the facts that the defendant is twenty-seven years of age and has a high school education.[2/] His consent to entering into the custody of the agents was not elicited in the "inherently coercive" environment of a "custodial interrogation," see id. at 240 (emphasis in original); he was not in custody at all until he consented to accompanying the agents. Rather, he consented while on his "own familiar territory." See id. at 247.

The consent obtained by the agents is not necessarily invalid by virtue of the defendant's initial refusal; the refusal of consent and how long afterwards acquiescence follows are merely factors in the overall voluntariness equation. Davis v. United States, 328 U.S. 582, 593-594 (1946). There is nothing constitutionally suspect in the existence and official exploitation of "incentives to full disclosure or active cooperation with the police," such as "the simple but often powerful convention of openness and honesty, the fear

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2/ He had not, however, previously experienced questioning by or a confrontation with police.

that secretive behavior will intensify suspicion, and uncertainty as to what course is most likely to be helpful . . . ." Coolidge v. New Hampshire, 403 U.S. 443, 488 (1971) (Part III of the Opinion of the Court, joined in by six Justices).[3/]

3/ The Court must be wary of participants in crime who upon finding themselves under investigation by the police seek self-servingly to give a misleading appearance of innocence by consenting to searches or seizures and then, when hoist by their own petards, strive to escape from the consequences of their dissembling cooperation by alleging that their outwardly voluntary consent to being detained or searched was subjectively involuntary due to intimidating circumstances. Cf. Bustamonte, 412 U.S. at 230-231.

The Court must also pay heed to "what Judge [now Chief Judge] Kaufman has termed the right of individuals to exculpate themselves." United States v. Quarles, 387 F.2d 551, 556 (4th Cir. 1967), cert. denied 391 U.S. 922 (1968). Chief Judge Kaufman wrote as a district judge:

> " . . . If the right of police to investigate a crime before formally arresting and charging a person is restricted too severely, not only will guilty persons go free, but innocent persons will suffer unnecessarily. Police officers tend, by and large, to uphold and be ruled by the law. There are overzealous policemen, just as there are bad members of other occupations and professions, but they are the exceptions in generally creditable callings. If the police are told that they may not question a person until he has been formally arrested and arraigned, they will carry out that precept to the letter, especially if to do otherwise would be likely to result in an escape from punishment by guilty men. Instead of giving a person an opportunity to exculpate himself from any suspicion of wrongdoing, they will arrest him first and ask questions afterwards.
>
> "That is not to suggest that they will compensate for their restricted authority to question by committing another illegal act, to wit, arrest and charging without sufficient grounds. There are many occasions where a man appears

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There is no evidence whatsoever that the agents physically threatened the defendant or claimed that they had the authority to take him to the police station without his consent. Compare Bumper v. North Carolina, 391 U.S. 543 (1968). The Court finds that the United States has sustained its burden, id. at 548, of proving that the defendant consented of his own free will and without intimidation to his accompanying agents of the F.B.I. on November 28, 1973, to the Hartford Police Station for the purpose of establishing--possibly by appearing in a line-up--to the satisfaction of the investigating authorities his innocence of the bank robbery under investigation.

II

After arriving at the Hartford Police Station but before appearing in the line-up, the defendant was handed a

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3/ cont'd

> guilty enough to be arrested and arraigned, when in fact he is entirely innocent of wrongdoing. This innocence may be easy to establish, once the suspect is allowed to give his story to the police. But it is easy to conceive of the police not allowing any suspect to say anything before formal arrest and arraignment if that practice were termed illegal by the courts, particularly if such conduct might result in the freedom of a person actually guilty." United States v. Bonanno, 180 F. Supp. 71, 82 (S.D. N.Y. 1960).

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form bearing the captions "YOUR RIGHTS AT A LINEUP" and "WAIVER AND CONSENT." The defendant executed this consent form, but maintains that far from establishing conclusively his consent to participate in a line-up, this form invalidates his consent to the line-up as a matter of law. This claim of invalid consent is based on the fact that the form states in pertinent part: "You have been asked to participate in a lineup. . . . You are required to participate in the lineup but you are entitled to have an attorney of your own choosing present." The defendant argues that except for the allegedly erroneous statement that he was required to participate in the line-up, he would not have done so.

The defendant's contention founders on the fact that there is no privilege specifically protecting an individual otherwise in custody from compelled appearance in a line-up. It is well established that compulsory appearance in a line-up abridges no Fifth Amendment right, because the evidence so disclosed is merely physical characteristics, having no "testimonial significance." United States v. Wade, 388 U.S. 218, 222 (1967); United States v. Dionisio, 410 U.S. 1, 5-6 (1973); Hernandez v. Schneckloth, 425 F.2d 89, 91 (9th Cir. 1970).

The defendant suggests, however, that Wade and its successors somehow overlooked a Fourth Amendment privilege against appearance in a line-up absent consent or judicial authorization, relying on Davis v. Mississippi, 394 U.S. 721

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(1969). Davis held illegal the "dragnet" seizure of dozens of persons so as to obtain their fingerprints for the purpose of comparing these against a fingerprint found at the scene of a crime. But as was pointed out in Dionisio, "in Davis it was the initial seizure--the lawless dragnet detention--that violated the Fourth and Fourteenth Amendments, not the taking of the fingerprints." 410 U.S. at 11. "[T]he obtaining of physical evidence from a person involves a potential Fourth Amendment violation at two different levels--the 'seizure' of the 'person' necessary to bring him into contact with government agents, see [Davis], and the subsequent search for and seizure of the evidence. . . . [¶] . . . Davis is plainly inapposite to a case where the initial restraint does not itself infringe the Fourth Amendment." Id. at 8, 11.

In the instant case it has already been held that the "initial seizure" was consensual--the defendant voluntarily accompanied the agents to the Hartford Police Station for the purpose of appearing there in a line-up if the agents decided that a line-up would be useful. Nothing in Davis or in any other case holds that the police, having gained a person's consent to the "seizure" or "detention" by which he is brought to the site of a line-up, must secure separately his consent to actual participation in a line-up. A line-up itself transgresses no Fourth Amendment privilege, any more than does the obtaining of handwriting samples or voice exemplars. Dionisio, 410 U.S. at 14.

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> "In Katz v. United States, [389 U.S. 347 (1967)], we said that the Fourth Amendment provides no protection for what 'a person knowingly exposes to the public, even in his own home or office . . . .' 389 U.S., at 351. The physical characteristics of a person's voice, its tone and manner, as opposed to the contents of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world." Id. (Emphasis added.)

There has been no suggestion in this case that the defendant sought to terminate his original consent by leaving the police station in advance of the line-up. Were such the case, the written line-up consent form would be of dubious significance in proving the defendant's continuing consent to remaining in police custody, since the form does state that participation in the line-up is "required." But on the facts herein, the written line-up consent was constitutionally superfluous. Indeed, the form itself does not purport to establish consent to participation in a line-up, but rather consent to participation in a line-up unassisted by the presence of counsel.[4/] The form bears the publication date

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4/ The full text of the consent form is as follows:

YOUR RIGHTS AT A LINEUP

> You have been asked to participate in a lineup. At the lineup, you will be obliged to stand in a line with other persons, to speak, to move in a certain manner, and/or to put on

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of "8-21-68" and was obviously concerned with the intimation in United States v. Wade, supra, that counsel or consent to the absence of counsel were required at all line-ups. This reading of the Sixth Amendment was rejected in Kirby v. Illinois, supra, and since the defendant had not been formally charged at the time of the line-up herein there was no need whatsoever for soliciting execution of the form by the defendant.5/

4/ cont'd

> or remove certain clothing for the purpose of enabling witnesses to make an identification. You are required to participate in the line up but you are entitled to have an attorney of your own choosing present. If you cannot afford an attorney but wish to have one present at the lineup, the lineup will be delayed until an attorney has been appointed by a court to represent you. Having an attorney present will help you in the preparation of your defenses to any identification which may be made at the lineup.
>
> However, you may waive your right to have an attorney present at the lineup and consent to participate in the lineup in the absence of an attorney
>
> WAIVER AND CONSENT
>
> I have (read) (had read to me) this statement of my rights and I understand what my rights are. I am willing to participate in a lineup in the absence of an attorney. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

5/ It is clear from the text of the form that the consent solicited relates only to the lack of counsel at a line-up, and not to the lawfulness of the custody which enables the police to

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III

Since the line-up at which the defendant was identified was not invalid for lack of consent or for any other reason, the only remaining basis for challenging the legality of the arrest of the defendant immediately following the line-up is the failure of the F.B.I. agents to obtain a warrant in advance of the arrest.[6/] The defendant contends that a warrantless arrest is invalid per se absent exigent circumstances to excuse the lack of a warrant, but fails to offer persuasive authority in support of this contention.

Two of the cases cited by the defendant do not even suggest this proposition. Beck v. Ohio, 379 U.S. 89, 96 (1964), held that since warrantless arrests lack the safeguards which accompany the warrant procedure, warrantless arrests must be subjected to at least as stringent scrutiny for probable cause as arrests under warrants, so that there is no disincentive to resort to the warrant procedure. Giordenello

5/ cont'd

place the defendant in a line-up. Nothing in the form purports to supplant independent judicial inquiry into the validity of that custody under established principles requiring a showing of judicial authorization, probable cause, perhaps mere "reasonableness" in some circumstances, see Davis v. Mississippi, supra, 394 U.S. at 727, or consent.

6/ At the time the defendant was notified that he was under arrest, the investigating agents had already begun the process of securing an arrest warrant. The defendant was identified at the line-up at approximately 10 p.m., and the warrant for his arrest was signed by Magistrate Parker at 11:50 p.m. that same night.

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v. United States, 357 U.S. 480, 488 (1958), refused to consider because of untimeliness proffered arguments about the validity of an arrest independent of the warrant under which it was made. The only arguable support for the defendant's position is United States v. Watson, ____ F.2d ____, 14 Cr. L. 2298 (9th Cir. 1973), in which a majority of the panel held that the police could not wait six days after gaining probable cause before making a warrantless arrest without being able to show exigent circumstances justifying their failure to use the six days to procure a warrant. The third member of the panel dissented with the declaration: "I know of no case which holds that officers must make an arrest the moment they come into possession of enough evidence to cause a magistrate to issue a warrant." 14 Cr. L. at 2299.

The majority in Watson relied on dicta in Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971) which stated the view of five Justices that "an arrest warrant is required in the absence of exigent circumstances" when the arrest requires "entry into the defendant's house," such as was the case in Warden v. Hayden, 387 U.S. 294 (1967), and Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970). Here no privacy interests were threatened by the formal arrest at police headquarters of a person who had already voluntarily submitted to police custody and participated in a line-up. This Court finds no basis in law for holding such an arrest constitutionally invalid for lack of a warrant despite the

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presence of probable cause by virtue of an eyewitness identification and express statutory authorization to make warrantless arrests upon probable cause. 18 U.S.C. § 3052.

IV

The next topic for consideration is the validity of the consent to the searching of his automobile and apartment given by the defendant subsequent to his arrest. Since the prior arrest has itself been deemed valid, the only basis for invalidating the consent to search would be a finding that it was involuntary. The government always has the burden of proof in showing the voluntariness of consent to search, Bumpers v. North Carolina, supra, 391 U.S. at 548, and this burden becomes heavier when the consent is rendered by a person who is in official custody and subject to the "coercive pressures" inherent in his arrest. United States v. Mapp, 476 F.2d 67, 78 (2d Cir. 1973). See Schneckloth v. Bustamonte, supra, 412 U.S. at 240, n. 29; United States v. DeMarco, 488 F.2d 828, 831 & n. 7 (2d Cir. 1973).

The defendant executed a written consent to search form which included notice that he had a right to refuse consent, and which authorized agents of the F.B.I. "to conduct a complete search of my premises located at 11 WINTER ST. 1ST FLOOR HARTFORD CONN AND MY 1973 PONTIAC CONN LICENSE LP

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3899."[7/] The undisputed testimony of Agent Miller, who witnessed the defendant's signing of the form, was that the form was read to the defendant before he signed it, and that the defendant himself read the form before he signed it. The signing took place in the presence of two agents, in a moderately sized interview room, with dimensions approximating eight by ten feet. Prior to the signing of the consent, the defendant was informed that he had been identified at the line-up. The defendant said he had not been at the bank. He was advised that he was under arrest, and he inquired as to what was going to happen next. The agent then asked if the defendant would consent to a search of his premises, and showed the defendant a copy of the consent form. The defendant indicated he had no objection, and the nature of the premises was then discussed.

7/ The full test of the consent to search form signed by the defendant is as follows:

> I, LEON McCLOUD, having been informed of my constitutional right not to have a search made of the premises hereinafter mentioned without a search warrant and of my right to refuse to consent to such a search, hereby authorize HARRY B. BRANDON III, and PHILLIP KRUMM, Special Agents of the Federal Bureau of Investigation, United States Department of Justice, to conduct a complete search of my premises located at 11 WINTER ST. 1ST FLOOR HARTFORD CONN AND MY 1973 PONTIAC CONN LICENSE LP 3899. These agents are authorized by me to take from my premises any letters, papers, materials or other property which they may desire.
>
> This written permission is being given by me to the above-named Special Agents voluntarily and without threats or promises of any kind.

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The defendant offered no evidence of any pressure to sign the consent to search form. The form itself gave notice of the right to refuse consent sufficient to rebut any inference of a lack of voluntariness based solely on whatever subtle coercion may have been inherent in the in-custody context in which the form was executed. The evidence shows that the defendant was completely willing to execute the consent to search form. Even if the search were certain to have produced incriminating evidence, a finding of the defendant's voluntary consent would be proper. United States ex rel. Lundergran v. McMann, 417 F.2d 519, 521 (2d Cir. 1969). A fortiori, where the defendant might reasonably have entertained notions of being exonerated by a search, see note 3, supra, whatever presumption of coercion may be appropriate regarding an in-custody consent to search must be deemed rebutted by the undisputed direct evidence that he gave his consent freely and willingly. Such is the case here. The Court accordingly finds that the consent to search form was executed voluntarily.

V

The voluntariness of the consent form disposes of the last remaining ground for the defendant's objection to the search of his automobile, and the motion to suppress is accordingly denied insofar as it relates to the items found in the defendant's car. Still to be decided, however, is whether the search of the defendant's apartment conformed to

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the scope of the consent given, and if not, if the search was otherwise valid.

Agent Miller testified that after the defendant had been shown the consent form and had agreed to consent to a search:

> " . . . I questioned him as to the premises in which he resided, the nature of the premises at 11 Winter Street. And he said it was an apartment type building, several different families residing there. I inquired which apartment or where he was specifically residing, and he said the first floor.
>
> "I also inquired as to whether, since this was an apartment type building, whether there was anything in the basement cubicles that were fenced off or partitioned which he would have sole access to or would have anything located. At this time he said no, that it was strictly an open type basement. As far as he knew there was nothing down there of any kind. There was nothing, no cubicles.
>
> "And also was informed that we were also interested in searching his automobile. Those two items I placed in the consent to search, as to what we were interested in searching."

In a subsequent interchange with the prosecuting attorney, Agent Miller further testified as follows:

> "Q Is it normal procedure to question an individual consenting to a search form with regard to his interest in the property being searched?
>
> "A Yes, sir.
>
> "Q What's the purpose of that questioning?
>
> "A To specify the area that is to be searched.

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"Q Was Mr. McCloud questioned with regard to that area?

"A Yes, he was.

"Q And what did he state?

"A He said that he resided at the first floor of that apartment building. And then I questioned him about other areas in the building that he may have control of. And at that point I specifically mentioned the basement, because in apartment buildings sometimes they are divided into various apartment portions and under individual control.

"And he said that was not the case in this building, that there was nothing in the basement. And that he had no control over anything in that basement, that there were no cubicles, and as far as he knew there wasn't anything of that nature in the basement. And the only place that he had any place where he resided or [had] control over was the first floor apartment."

After stating on cross-examination that he was paraphrasing the defendant insofar as he testified that the defendant said he had "no control" over the basement area, Agent Miller replied as follows to further questions from counsel for the defendant:

"Q . . . So, in other words, the only authority that [the defendant] gave you was to search the first floor of 11 Winter Street and his automobile, is that correct?

"A That's all he had control over.

"Q I'm not asking that question, sir. I'm asking you if that is what he gave you authority to search?

"A Yes."

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The defendant himself testified that the only qualification he enunciated when he gave his consent to the search was "not to touch any of my business papers." The defendant stated that the agents "didn't mention anything about the basement," which he testified was used by him and possibly by the family in the apartment above him. When asked if "on this form did you deliberately limit the search to the first floor," the defendant replied simply:

> "I told them--they asked me could they search the apartment and my car. And I told them or asked them what would they be--you know, not touch any of my paper work, my business papers. That's what I told them. And they told me that they wouldn't touch any of my paperwork."

Based on this slightly conflicting evidence, the Court finds that Agent Miller's inquiries as to the nature of the defendant's premises, including whether the defendant had the use of a portion of a basement area, were directed towards ascertaining the limits of the defendant's premises as opposed to areas controlled by the other occupants of the second, upstairs apartment in the building in which the defendant lived. Such inquiries are, of course, essential to avoiding intrusions on the privacy of occupants of apartments other than that occupied by an individual residing in a multiple-family dwelling who has consented to the search of his own particular premises. The specification of "11 WINTER ST. 1ST FLOOR" on the consent form was intended only to distinguish

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the defendant's premises from the second-floor apartment sharing that same address. The form itself authorizes "a complete search of my premises" at the specified address: there is no indication on the face of the form and no support in the evidence--including the testimony of the defendant himself--for the defendant's contention that his consent to search was expressly limited to the main floor of his apartment proper, to the exclusion of the basement area which was directly connected to his apartment. Given the testimony of both the defendant and Ms. Edwards that the basement was, so far as they knew, exclusively used by them,[8/] and given the consent form's authorization of a "complete search" of the defendant's premises, no conceivable purpose would be served by holding that separate authorization by consent or judicial authorization was necessary for the consensual search to extend into the basement. The search of the basement intruded on the privacy of no one other than the defendant himself, who had voluntarily waived his right to such privacy. This is not a case where the basement was a storage area open to common use with access separate from the premises to be searched. The basement here was an integral part of the premises listed on the consent form. The search of the basement did not exceed the scope of the authorization given by the defendant in executing the consent form.

8/ An attic area was available to the occupants of the second floor apartment for storage purposes.

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VI

As an alternative basis for upholding the validity of the search of the basement, the Court finds that this search was authorized independently of the defendant's written consent by the oral consent of his common law wife and co-tenant. Agent Santacroce testified that during the course of the search of the defendant's apartment, an agent reported to him that there was a door leading down to a basement.

> " . . . And I asked Eva Edwards if it was all right to search the basement.
>
> "However, before she answered I asked her what was down in the basement and if she kept anything in the basement. She said that she and the other family in the building shared the basement.
>
> "I asked her if she wanted to go down in the basement with the agents and she declined, she said no, she didn't want to go in the basement with the agents. And I asked her if it was all right to search it and she said yes, it was."

Ms. Edwards' consent was also testified to by Agent Brandon, who participated in the search of the basement.

Ms. Edwards denied having given consent to search the basement. She maintained that the agents had asked only what was behind the door that led to the basement, and that when she replied the agents went right down to the basement. Ms. Edwards became somewhat confused under cross-examination, however:

"Q You stated that no FBI agent present at the house that evening was given your permission to go down or conduct a search in that basement?

"A No.

"Q Would you tell us, to the best of your recollection, what they said to you concerning that area and what you said to them?

"A You asked me--they asked me what this door leads to. I said the basement. And that was it.

"And then the two FBI's went down in the basement and they came back.

"Q Who asked you the question, do you recall which agent?

"A I think it was you.

"Q You think I asked you?

"A Yes. The man looked something like you.

"Q Can you tell us who else was there?

"A It was the one that testified first, and then--

"THE COURT: Santacroce?

"A Yes, Santacroce. And two other ones that came in the house. I don't know. I remember three being there when the search was going on.

"Q [By the prosecuting attorney] What time did I arrive there?

"A I didn't say directly that it was you. I said I think it was you. Because, you know, you look alike. There was a guy looked something like you.

"Q And that individual made a statement to you that--what did that individual say?

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"A Let me put it this way: One of the men asked me could they -- asked me what did the door lead to. And I told them the basement. And that was it." [Emphasis added.]

The Court again credits the testimony of Agent Santacroce over that of Ms. Edwards. See page 6, supra. More than a slip of the tongue was likely involved when Ms. Edwards started to say that the agents had asked her "could they" go to the basement rather than what was behind the basement door. Besides the testimony of Ms. Edwards denying her oral consent to the search of the basement, the only support the defendant offers for his version of the facts is the alleged conflict between the oral consent and the written consent forms executed by the defendant and Ms. Edwards. Ms. Edwards signed a written consent form identical to that of the defendant, specifying "11 WINTER ST., 1ST FLOOR" as the premises which Ms. Edwards was authorizing to be completely searched. Since Ms. Edwards was allowed to speak with the defendant before signing her consent form, the defendant maintains that their consent forms together provide written proof of their joint intention to limit the search of their apartment to its main floor, the first floor of the building, and that Ms. Edwards' purported oral consent is at odds with this written proof of intent. However, the Court has already held that no such intent can be read into the defendant's own consent form. A fortiori, no intent to limit the search to less than the "complete search" of the premises specified on the face of the

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form can be read into Ms. Edwards' written consent. The address on her consent form was filled in by the agents, manifestly by exact reference to the form previously signed by the defendant. There is no evidence whatsoever that at any time before or after her conversation with the defendant Ms. Edwards herself sought to inject any limitation into her proposed consent to search.[9/] The Court accordingly finds as a fact that Ms. Edwards voluntarily gave oral consent to the agents' search of the basement of her apartment.

The Supreme Court has just this year expressly held that the prosecution herein may rely on Ms. Edwards' consent to the search of the basement. "[W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effect[s] sought to be inspected." United States v. Matlock, 42 U.S.L.W.

9/ The validity of Ms. Edwards' written consent need not be decided, since save for the alleged conflict between the terms of the written consent and the alleged fact of the existence of the oral consent, Ms. Edwards' written consent has no bearing on the Court's disposition of the defendant's motions to suppress.

It should be noted, however, that the written consent form signed by Ms. Edwards did give her notice of her rights to refuse to a search and to demand that a warrant be obtained. See note 7, supra. Thus Ms. Edwards was aware of her right to refuse when asked to consent orally to the search of the base-

4252, 4254 (U.S. Feb. 20, 1974). The defendant does not argue that Ms. Edwards, with whom he shared the apartment and the rent, and whom he acknowledges as his wife, lacked "sufficient relationship" to the basement to give her consent to its being searched. Rather, the defendant argues that Matlock's doctrine of third-party consent is inapplicable when the defendant himself has expressly refused to consent to a search and so has invoked his right to compel the authorities to seek a warrant.

The Court need not address the merits of this argument, since it has previously held that the defendant did not so seek expressly to exclude the basement from the scope of the search to which he was willing to consent. Even if it were to be held as a matter of law, contrary to this Court's holding herein, that the defendant's written consent to search was too vague, in view of the government's burden of proof, to be applicable to the search of the basement, there remains this Court's findings of fact that apart from whether or not the defendant expressed his legally cognizable consent to the search of the basement, he certainly did not articulate any express objection to the search of the basement. Indeed, there is not even any evidence of such an objection, even from the defendant himself. However useful such an objection may be as a postulate by which the defendant's conduct in giving his address as 11 Winter Street, "1st floor," assumes cunning significance, the fact remains that proof of the existence of

the defendant's objection to a search of his basement has been confined to the conjecture of the defendant's counsel. In such circumstances the government is in no way estopped from availing itself of the third-party consent permitted under Matlock.

The defendant also argues that the fact that his whereabouts were known to the searching agents, who had easy access to him, carried with it a requirement that the agents seek consent to the search of the basement from him rather than from a third party. The defendant cites as authority for this point two articles, one case, United States v. Robinson, 479 F.2d 300, 303 (7th Cir. 1973), and a dissenting opinion in another case, United States v. Stone, 471 F.2d 170, 174, 177 (7th Cir. 1972), cert. denied 411 U.S. 931 (1973). These authorities all ante-date Matlock, however, which premised the validity of the third-party consent doctrine on the defendant's assumption of the risk that a co-inhabitant "might permit the common area to be searched." 42 U.S.L.W. at 4254, n. 7. Matlock cannot be read as if the risk so assumed is a sliding scale of liability to a search of common areas under a third party's consent, with the risk varying inversely to the defendant's accessibility to the police at the time the third party's consent to the search is elicited. Save for whatever estoppel may be posed by one of the co-inhabitant's express refusal to consent to a search and demand that the authorities secure a warrant, Matlock appears to recognize in any one of

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several co-inhabitants an absolute right at any time "to permit the inspection in his own right" of the property jointly inhabited or controlled. Id.

The Court concludes that Ms. Edwards' oral consent to the search of the basement renders lawful the use against the defendant of the fruits of that search.

The defendant's motions to suppress are denied.

SO ORDERED.

Dated at Hartford, Connecticut, this 19th day of September, 1974.

M. Joseph Blumenfeld
United States District Judge

Santacroce made careful arrangements to insure the proper atmosphere (pgs. 8-10). At the line the individuals were presented in an appropriate manner and a photograph was taken (Exhibit 2). Each participant stepped forward and repeated a brief statement, a procedure permitted by United States v. Wade, 388 U.S. 218 (1967). The participants were all black males with no distinctive physical characteristics or attire which might unreasonably influence an identification. See, e.g. Line-up-Suggestiveness, 39 ALR 3d 487; Simmons v. United States, 390 U.S. 377 (1968); United States v. Roth, 430 F.2d 1137 (2d Cir. 1970), cert. denied 400 U.S. 1021 (1971).

The government submits that the defendant was not denied due process because the line-up was conducted in a permissible manner which was neither suggestive nor conducive to irreparable mistaken identification.

II. The defendant was not improperly denied assistance of counsel.

In Kirby v. Illinois, 406 U.S. 682 (1972), the Supreme Court modified the decisions of Wade, supra, and Gilbert v. California, 388 U.S. 263 (1967), by establishing the right to counsel at the point when "adversary judicial criminal proceedings--whether by way of formal charge, preliminary hearing, indictment, information, or arraignment" have commenced. 406 U.S. at 689. None of the steps mentioned above had occurred to McCloud at or prior to the line-up and, therefore, his right to counsel did not attach.

In Saltys v. Adams, 465 F.2d 1023 (2d Cir. 1972), the Court declined to follow Kirby where the defendant had been arraigned on another robbery charge and either retained or was assigned counsel. But see the dissenting opinion of Friendly, Chief Judge, Id. at 1029. However, the facts here are clearly distinguishable from Saltys.

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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,	:	
Plaintiff	:	
v.	:	CRIMINAL NO. H-610
LEON MCCLOUD,	:	
Defendant	:	

OPPOSITION TO DEFENDANT'S
MOTION TO SUPPRESS IDENTIFICATIONS

Plaintiff, United States of America, opposes defendant's motion to suppress identifications, based upon the files and records in this case and the following memorandum of points and authorities.

Memorandum of Points and Authorities

I.

Background

On November 28, 1973, at approximately 3:00 p.m., the Enfield, Connecticut Branch of the State-Dime Savings Bank was robbed by one individual. (Hearing on Motion to Suppress, p. 31). At approximately 7:20 p.m. that same date, FBI agents, during the course of a general investigation concerning the robbery, contacted the defendant at his apartment at 11 Winter Street, Hartford (pgs. 14, 31). The agents were initially met at the door by the defendant's common law wife, Eva Edwards, who stated that McCloud did not live there (p. 15). McCloud subsequently emerged from another room in the apartment and was questioned by the agents concerning his whereabouts that afternoon (p. 15). Although McCloud was considered to be the "best lead" the FBI had at that moment (p. 32) he was not a suspect (p. 32) and was not accused of the robbery (p. 16).

During the questioning at the apartment Special Agent Dewey Santacroce asked McCloud to go to the Hartford Police Station to appear in a line-up (pgs. 18, 44). Santacroce and Special Agent James Millen both testified that McCloud consented without reservation (pgs. 18, 45). The defendant and his wife testified that Santacroce asked McCloud to go downtown to "clear things up" (pgs. 59, 79) and that McCloud had initially objected by stating he was tired and would wait until the next day (pgs. 59, 79).

Millen testified that McCloud arrived at the police station at approximately 8:15 p.m. and was taken to an interview room where, at approximately 8:25 p.m., he read and executed a standard advice of rights form (p. 46, 107-108, Exhibit 3).

At 9:30 p.m. McCloud read and executed a standard rights at line-up form (p. 108, Exhibit 1) and orally indicated he understood what his rights were (p. 110). At the line-up, Ernest Woollette, the bank's branch manager, positively identified McCloud as the robber (p. 48). Millicent Root, the assistant branch manager, identified McCloud as resembling the robber but was unable to make a positive identification (p. 48-49).

Following the line-up, at approximately 10:00 p.m., McCloud was placed under arrest (p. 113).

II.

Discussion

I. The line-up was not conducted in an impermissibly suggestive manner.

The Supreme Court has recognized that a pre-trial confrontation may be "so unnecessarily suggestive and conducive to irreparable mistaken identification" that a defendant would thereby be denied due process of law. Stovall v. Denno, 388 U.S. 293, 302 (1967). However, the Court stated that a claimed violation of due process in this area depends on the "totality of the circumstances." Id.

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Even assuming McCloud's right to counsel had attached prior to the line-up there was a knowledgeable and intelligent waiver. McCloud was given Miranda warnings within minutes after his arrival at the police station (Exhibit 3). Immediately prior to the line-up he was again advised of his right to counsel (Exhibit 1).

The record clearly demonstrates that McCloud voluntarily accompanied FBI agents to the police station where, after being advised of his right to counsel on two separate occasions, he, without any objection, appeared in a line-up.

III.

Conclusion

The relief requested by the defendant should be denied for the reasons stated above.

Dated at Hartford, Connecticut this 16th day of April, 1974.

UNITED STATES OF AMERICA

STEWART H. JONES
United States Attorney

By Albert S. Dabrowski
ALBERT S. DABROWSKI
Assistant U. S. Attorney

CERTIFICATION

This is to certify that a copy of the foregoing Opposition to Defendant's Motion to Suppress Identifications was mailed, postage pre-paid, to David S. Golub, Esq., University of Connecticut Law School, 1800 Asylum Avenue, West Hartford, Conn. 06117, this 16th day of April, 1974.

Albert S. Dabrowski

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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,	:	
Plaintiff	:	
v.	:	CRIMINAL NO. H-610
LEON MCCLOUD,	:	
Defendant	:	

OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND FOR RETURN OF PROPERTY

Plaintiff, United States of America, opposes defendant's motion to suppress evidence and for return of property based upon the files and records of this case and the following memorandum of points and authorities.

Memorandum of Points and Authorities

I.

Background

The defendant, LEON MCCLOUD, was arrested at 10:00 p.m. on November 28, 1973 for the robbery of a federally insured bank. The defendant and his wife then consented, in writing, to a search of their residence at "11 Winter Street, 1st Floor, Hartford, Conn." (Exhibits 4 and 5). The defendant also consented to a search of his automobile (Exhibit 4).

During the search of the residence, conducted in the presence of the defendant's wife, Special Agent Harry Brandon discovered a door leading to a basement (P. 139). Special Agents Brandon and Dewey Santacroce testified that the defendant's wife indicated she had no objection to a search of the basement (pgs. 139, 156). Mrs. McCloud testified that the agents neither asked nor were given permission to search the basement (p. 164).

The search of the basement revealed a paper bag containing $13,790 in Connecticut Bank and Trust Company wrappers bearing Enfield Branch teller stamps and a 9mm semi-automatic pistol. The search of the automobile revealed a box of .380 shells.

II.

Discussion

I. The Search of the basement was lawful because a voluntary consent was given by a third party in control of the premises.

The defendant and Eva Edwards, although not formally married, have been living together as husband and wife for a number of years (p. 77). Eva Edwards testified that she rented the apartment and that "we" (the defendant and herself) pay the rent (p. 82). It is well established that one spouse generally can consent to a search of a residence shared with the other spouse where evidence is sought against the other spouse. United States v. Pugliese, 153 F.2d 497 (2d Cir. 1945); United States v. Heine, 149 F.2d 485 (2d Cir.), cert. denied, 325 U.S. 885 (1945).

There is no claim that the consent was the product of coercion. Eva Edwards simply asserts that she was never asked to consent to a search of the basement (p. 164). This must be weighed against the testimony of Agents Santacroce and Brandon who testified that Eva Edwards did indicate an approval of a basement search (p. 139, 156).

The consent was made with the knowledge of the right not to consent since Mrs. Edwards read and executed the standard written consent to search form approximately one hour prior to the actual search.

A search of property conducted pursuant to a valid consent is constitutionally permissible. Schneckloth v. [illegible]

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412 U.S. 218 (1973); Davis v. United States, 328 U.S. 582 (1945). In establishing a valid consent the government is not limited to proof that the consent was given by the defendant but may rely on authority to search obtained from a third-party possessing common authority over the premises being searched. United States v. Matlock, 42 U.S.L.W. 4252 (U.S. February 20, 1974). Common authority sufficient to justify a third-party consent requires "mutual use of the property by persons generally having joint access or control . . . ." Id. at 4254, fn. 7.

II. The search of the car was lawful because a voluntary consent, in writing, was given by the defendant.

The defendant upon arriving at the police station was promptly given the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966), for custodial interrogations even though he had not yet been accused (Exhibit 3). Immediately following his arrest he read and executed a consent to search form in which he was advised of his right not to consent to a search (Exhibit 4). There is no evidence of coercion or intimidation. The totality of the surrounding circumstances clearly demonstrates that the consent was in fact voluntary. Schneckloth v. Bustamonte, supra.

III.

Conclusion

The relief requested by the defendant should be denied for the reasons discussed above.

Dated at Hartford, Connecticut this _____ day of April, 1974.

UNITED STATES OF AMERICA

STEWART H. JONES
United States Attorney

By

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C E R T I F I C A T I O N

This is to certify that a copy of the foregoing Opposition to Defendant's Motion to Suppress Evidence and for Return of Property was mailed, postage pre-paid, to David S. Golub, Esq., University of Connecticut Law School, 1800 Asylum Avenue, West Hartford, Connecticut, this _____ day of April, 1974.

ALBERT S. DABRONSKI
Assistant U. S. Attorney

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	CR. NO. H-610
vs.	:	
LEON MCCLOUD	:	

MOTION TO SUPPRESS IDENTIFICATIONS

The defendant, LEON MCCLOUD, through his attorney undersigned, respectfully moves this Court to suppress as evidence against him in any criminal proceeding the following identifications:

1. The out-of-court identification made by Ernest Woollette on November 28, 1973, of the defendant as the perpetrator of the offenses alleged in the above-captioned action;

2. The out-of-court identification made by Millicent Root on November 28, 1973, of the defendant as the perpetrator of the offenses alleged in the above-captioned action;

on the ground that:

1. Said identifications were conducted in such an impermissibly suggestive manner as to create a substantial likelihood of mistaken identification, in violation of the Defendant's rights under the Fifth Amendment of the United States Constitution;

2. Said identification occurred immediately subsequent to an illegal arrest and constituted, therefore, the fruits of an illegal arrest, in violation of the Defendant's rights under the Fourth Amendment of the United States Constitution;

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3. The Defendant was denied his right to the assistance of counsel at said identifications, in violation of the Defendant's rights under the Sixth Amendment of the United States Constitution.

The Defendant further moves this Court to suppress as evidence against him in any criminal proceeding any further identifications of the Defendant by Woollette or Root as the perpetrator of the alleged offenses on the ground that said future identifications would be irreparably tainted by the prior impermissible identification, producing a substantial likelihood of misidentification.

In support of this motion, the defendant alleges the following facts:

1. The Defendant was illegally arrested without a warrant by agents of the Federal Bureau of Investigation on November 28, 1972, in connection with this case.

2. Subsequent to his arrest, the Defendant was presented in a line-up to witnesses Wollette and Root.

3. No counsel was present at this line-up.

4. With the exception of the Defendant, the participants in the line-up significantly failed to conform to the descriptions of the perpetrator of the alleged offenses given by Wollette and Root.

5. Woollette made a positive identification of the Defendant as the perpetrator of the alleged offenses.

6. Root could not positively identify the Defendant as the perpetrator of the alleged offenses, but was able to rule out postively the other participants in the line-up.

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WHEREFORE, Defendant prays this Motion be granted.

Respectfully submitted,

THE DEFENDANT

BY: _____
DAVID S. GOLUB
His Attorney

O R D E R

The foregoing motion having been heard, it is hereby ORDERED That the identifications noted above be suppressed for the foregoing reasons.

BY THE COURT _____

_____
Clerk/Assistant Clerk

CERTIFICATION

It is hereby certified that a copy of the foregoing has been mailed, postage prepaid, to the United States Attorney, Hartford, Connecticut, this _____ day of January, 1974.

_____
DAVID S. GOLUB

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	CR. NO. H-620
vs.	:	
LEON EUGENE MCCLOUD	:	

MOTION TO SUPPRESS AS EVIDENCE AND FOR RETURN OF PROPERTY

The defendant, LEON MCCLOUD, through his attorney undersigned, respectfully moves this Court to suppress as evidence against him in any criminal proceeding and return to him the following property seized from him and his premises by government agents on November 28, 1973:

1. Thirteen thousand seven hundred ninety dollars in cash;
2. One 9 mm semi-automatic pistol;
3. Any and all money wrappers;
4. One box .380 shells;
5. Any and all paper bags or other containers;
6. All other property taken from the Defendant or his premises on November 28, 1973;

on the grounds that:

1. Said property was seized illegally, without warrant or the Defendant's valid consent, on said date;
2. Said property was seized subsequent to an illegal arrest and constituted, therefore, the fruits of an illegal arrest,

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in violation of the Defendant's rights under the Fourth Amendment of the United States Constitution.

In support of this motion, the Defendant alleges the following facts:

1. On November 28, 1973, the Defendant was illegally arrested without a warrant, by agents of the Federal Bureau of Investigation in connection with this case.

2. Subsequent to this arrest, agents of the Federal Bureau of Investigation conducted a search, without a warrant, of the Defendant's premises and the Defendant's automobile.

3. Pursuant to such search, the items listed herein to be suppressed were seized.

WHEREFORE, for the foregoing reasons, the Defendant prays this motion be granted.

Respectfully submitted,

THE DEFENDANT

BY: _____
DAVID S. GOLUB
Defendant's Attorney

ORDER

The foregoing motion having been heard, it is hereby ORDERED that the above motion be granted.

BY THE COURT _____

_____
Clerk/Assistant Clerk

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CERTIFICATION

A copy of the foregoing has been mailed, postage prepaid, to the United States Attorney, Hartford, Connecticut, this ___ day of January, 1974.

DAVID S. GOLUB

CERTIFICATION

I hereby certify that a copy of the foregoing Appendix to Appellant's Brief was mailed, postage prepaid, to Peter Dorsey, Esq., United States Attorney, 450 Main Street, Hartford, Conn., this 5th day of May, 1975.

DAVID S. GOLUB, ESQ.

PAGINATION AS IN ORIGINAL COPY